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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Petitioner,

vs.

William W. Scarlett,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled cause on August 7th, 1936.

Opinion Below.

The opinion of the Supreme Court of the State of California is reported in 60 Pac. (2d) 462.

Jurisdiction.

The judgment of the Supreme Court of the State of California was first entered on January 31, 1936. Then on February 27, 1936, the Court vacated and set aside said judgment, granted petitioner's petition for a rehearing, and ordered the cause placed on the calendar for argument. On April 7, 1936, the cause was finally submitted. Final judgment was entered on August 7, 1936.

The jurisdiction of this Court is invoked under volume 44 (part 1) of the United States Statutes at Large, title 28, section 344 (Judicial Code Sec. 237 amended).

Statutes Involved.

The pertinent statutes involved are the Federal Safety Appliance Act of 1910 (36 U. S. Statutes 298, U. S. C. A. title 45, sections 11 to 16); 27 U. S. Statutes 531, U. S. C. A. title 45, section 7; 35 U. S. Statutes 66, U. S. C. A. title 45, section 54.

Questions Presented.

The questions presented are:

(A) Whether the Supreme Court of the State of California erred in deciding that a safety appliance defect may be predicated on the single fact that between the side ladder of a freight car and the side of the car there was a diagonal brace rod, when the clearance between the rungs of the ladder and the brace rod was two and three-quarters (2¾) inches. The orders and specifications of the Interstate Commerce Commission did not require a clearance in excess of two and one-half (2½) inches.

(B) Whether the Supreme Court of California erred in sustaining the trial court in submitting to the jury the question whether the side ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace rod.

(C) Whether there was sufficient evidence to sustain the verdict in so far as it involves a finding that the ladder did not meet the requirements of the Safety Appliance Act.

Statement of the Case.

The respondent, a railroad brakeman in the employ of petitioner, while climbing down the side ladder of a freight car, slipped and fell to the ground. The freight car was moving at a speed of about two miles an hour and the movement of the car had nothing to do with the accident. The respondent testified that his fall was caused by his foot coming in contact with an anchor rod or brace rod behind the ladder, which caused his feet to leave the ladder and his hands to jerk from the hand-holds.

This anchor rod is a diagonal brace rod placed at an angle of 45 degrees across the lower corner of the freight car, between the side of the car and the side-ladder. There was a two and three-quarters inch clearance between the side-ladder and the nearest portion of the anchor rod. The orders and specifications of the Interstate Commerce Commission require a clearance of two inches, preferably two and one-half inches—(Roberts' Federal Liability of Carriers, page 2013). The function of the brace is to strengthen the end of the freight car. The petitioner had 7,000 freight cars identically equipped at the time of the accident.

The respondent based his cause of action wholly upon an alleged defective safety appliance, to-wit, the side ladder, expressly waiving any cause of action under the Employers' Liability Act, and claimed the presence of the anchor rod, notwithstanding the fact that the side ladder had a "clearance" greater than required by the Interstate Commerce Commission, raised a jury question as to whether the side-ladder was "secure" within the meaning of the statute.

The Supreme Court of the State of California, adopting respondent's theory of the case, sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace-rod between the side-ladder and the side of the freight car. The jury returned a verdict against petitioner for $18,000.

(The photograph opposite this page, although not an exhibit in the case, is a true picture and representation of the side-ladder and brace-rod involved.)

Reasons Why Writ of Certiorari Should Be Granted.

There are special and important reasons why the writ of certiorari should be granted. The Supreme Court of the State of California has decided a federal question of substance not theretofore determined by this Court and has decided it in a way not in accord with applicable decisions of the federal courts and other state courts.

On March 2, 1893, an Act of Congress was approved providing as follows:

> "Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it

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shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (Chapter 196, sec. 4, United States Statutes at Large, 27 Stat. 531.)

On April 15, 1910, there was approved another Act of Congress providing as follows:

"Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

"Sec. 3. That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission

> may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *." (Chapter 160, Secs. 2 and 3, United States Statutes at Large, 36 Stat. 298, 299.)

On September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of section 3 of the above-named Act of Congress; and on March 13th, 1911, the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of certain safety appliances, among which was that of ladders on the sides of box and other house cars; that said order, after designating the number and dimensions of said ladders, provided that said ladders should have a minimum clearance of treads of two, preferably two and one-half inches. This order, so far as it relates to the particular safety appliance involved in this case, has never been amended or repealed. (Volume 2, Roberts' Federal Liability of Carriers, pp. 2010 to 2013.)

The record is without conflict that petitioner complied in every respect with the foregoing rules and specifications of the Interstate Commerce Commission then in force.

It is petitioner's contention that when a safety appliance "meets the tests and rules fixed by the Commission, it must, so far as carriers in interstate commerce are concerned, be esteemed proper and safe * * * thus the Commission sets the standard. * * * By setting the standard it imposes requirements. * * * It prescribes the rules and regulations by which fitness for service shall be determined." (*Atlantic Coast Line R. R. C. v. Napier et al.*, 272 U. S. 605, 71 L. Ed. 432, 2 Fed. (2d) 891.)

In a case almost identical with the case at bar—*Lehigh & N. E. R. Co. v. Smale,* 19 Fed. (2d) 67, where a brakeman's glove caught in a flag-holding device near the handhold, the Circuit Court of Appeals, Third Circuit, approved an instruction of the District Court wherein the court said

> "if the grab irons comply with the regulations of the Interstate Commerce Commission that is the end of your deliberations, and you would find a verdict for the defendant."

In *Fredericks v. Erie R. Co.,* 36 Fed. (2d) 716, the Circuit Court of Appeals, Second Circuit, in criticising the action of the District Court in permitting a jury to say whether the engine was defective because of the alleged unsafe location of a drain-cock, said:

> "* * * it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put."

In *Erie R. R. Co. v. Lindquist,* 27 Fed. (2d) 98, where a violation of the Boiler Inspection Act was claimed on account of a failure to equip or operate an engine and tender without a guard-chain which was not a required appliance, the Circuit Court of Appeals, Third Circuit, said:

> "But in all cases under these statutes that have come to our attention, performance is complete and liability thereunder ends when the carrier has observed their requirements by supplying and maintaining in operative condition the safety appliances required."

The state courts have consistently adhered to the same view. The Supreme Court of Illinois, in *Auschwitz v. Wabash Ry. Co.,* 178 N. E. 403, in a case involving a sill-step on an engine, constructed in accordance with the requirements of the Interstate Commerce Commission, said:

> "The decision of this ultimate fact rests solely with the Commission. A jury cannot be permitted to substitute its judgment in lieu of the judgment of the Commission upon whom the law places the responsibility for such determination. * * * We are of the opinion that, when the carrier complies with the requirements of the Interstate Commerce Commission, as it has done here, and therefore the Act of Congress, it cannot be found guilty of actionable negligence because the plaintiff or a jury might think ordinary care required something additional."

The court further said:

> "When the Commission has, by order, prescribed rules and specifications in regard thereto, all that is required of the carrier to fulfill its duty in that respect is a strict compliance therewith."

Again, in *Chicago, R. I. & P. Ry. Co. v. Benson,* 185 N. E. 244, the Supreme Court of Illinois held that a wire attached to the grab-iron and which caught the glove of a switchman, causing severe injuries, was no part of the grab-iron.

In *Pursglove v. Monongahela Ry. Co.,* 131 Atl. 477, the Supreme Court of Pennsylvania, in a case where a brakeman's coat caught on a bolt which fastened footboards to the locomotive, held that since there was no lack of compliance with the statutory duty, recovery could be had only if negligence had been established.

In *Mahutga v. Minneapolis, St. Paul etc. Ry. Co.,* 234 N. W. 474, a question arose as to use of certain cab curtains in a locomotive which had been standardized by the Interstate Commerce Commission. In deciding the case the court said:

> "Our construction of the decision and order of the Commission is that it intended to and did standardize the Wisconsin side curtain, here used, as suitable for all the purposes of the law, and it follows that a compliance therewith makes the locomotive 'safe to operate without unnecessary peril to life or limb.' The decision of this ultimate fact rests solely with the Commission."

In *Lancaster & Wright v. Allen,* 217 S. W. 1032, the Supreme Court of Texas decided a case where it appeared in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the Act of Congress, had made certain rules governing what condition of flanges on a locomotive wheel made it safe and what condition made it unsafe.

The trial court refused a special charge requested by plaintiffs in error as follows:

> "It appears in this case that Allen at the time he was killed was engaged in interstate commerce, and the rights of the plaintiffs are therefore governed by the act of Congress. It appears in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the act of Congress, had made certain rules governing what condition of flanges of a locomotive wheel makes it safe and what condition makes it unsafe. If you believe in this case that the flanges on the wheel were in accordance with said rules enacted by the Interstate Commerce Commission, then you cannot find that the railroad was negligent in that regard."

Regarding the above refused instruction the Supreme Court of Texas said: "In our opinion, the proper test was stated in the refused charge."

The California Supreme Court seeks to avoid the effect of these holdings in the federal and state courts by saying:

> "Where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the Commission has failed to regulate a particular matter that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail." (60 Pac. (2d) 462.)

It will be observed that the California court therefore assumes that the Commission has not made a rule in re-

gard to the particular matter involved here. The Court further said:

> "The ladder itself * * * was unsafe in use * * * and the reason it was insecure was that the round rod had been so inserted in back of it as to create a hazard, despite the existence of the clearance specified by rule * * * the clearance rule of the Commission should not be construed as a legalization of the round rod type of brace in the space between car side and ladder." (60 Pac. (2d) 462.)

Nowhere in the specifications of the Interstate Commerce Commission is there the slightest intimation that the "clearance" referred to means the space between the side ladder and the *surface* of the box car. The word "clearance" in car construction, as well as to all machinists, has a very definite meaning. Defined in Webster's International Dictionary as "the clear distance by which one object clears another, or the clear space between them," and by Funk and Wagnall's New Standard Dictionary as "the space by which a moving machine or part clears something," this is its accepted meaning in practical railroad construction. As applied to this case, it means the distance between the rungs of the ladder and the nearest fixed object, the brace-rod. (*Palomino v. Atchison etc. Ry. Co.* (Kansas Supreme Court, 138 Pac. 616. That has been the interpretation placed upon the term for years by all railroads. Every railroad has for years used some kind of a brace-rod between the side-ladder and the surface of the box car, and has provided for the clearance of the side-ladders with reference thereto.

The Supreme Court of California has erred in assuming that the Interstate Commerce Commission has not made a rule and order applicable to this case.

The Interstate Commerce Commission, in compliance with section 3 of the federal statute heretofore quoted, held its investigation and, after being fully advised, fixed the standards of construction of side-ladders on freight cars. The Commission's order is printed in full in Volume 2 of Roberts' Federal Liability of Carriers, pages 2013 and 2014. The Commission fixed the number, location, dimensions and manner of application of the safety appliances, including the ladders; it designated in detail the minimum length of ladder treads, the maximum spacing between the ladder treads, the location of the ladder tread with reference to the roof, the spacing of the ladder treads, the maximum distance from bottom tread of side ladder to top tread of sill step, the location of the end ladders, the minimum dimensions of hardwood treads, the minimum diameter of iron or steel treads; then comes the "*minimum clearance of treads two (2), preferably two and one-half (2½) inches.*" (Italics ours.) Following this, in the Commisison's order, are detailed specifications as to the location of the side ladders and further detailed specifications as to the manner of application.

It is obvious, therefore, that the Supreme Court of California was mistaken in its contention that no rule or order had been made by the Interstate Commerce Commission governing the clearance of the side ladder where a brace rod existed between the surface of the box car and the rungs of the ladder, and its decision is in fact out of harmony with the law that has been laid down in both the Federal and state courts that we have cited.

The petitioner, in constructing its freight cars, has been looking to the orders and specifications of the Interstate Commerce Commission for its guidance. If, after thus following out the rules and specifications of the Interstate Commerce Commission every jury in the land may "substitute its judgment in lieu of the judgment of the Commission upon whom the law places the responsibility for such determination" (*Mahutga v. M., St. P. etc. Ry. Co.*, 234 N. W. 474), then the uniformity of the safety appliances, which was the object of the federal statute, has been taken away.

The Supreme Court of California in thus holding that the presence of this diagonal brace rod raises a jury question as to whether the side-ladder is insecure, takes a stand contrary to the weight of authority in both the federal and state courts; and this is a federal question of substance not heretofore determined by the Supreme Court of the United States.

Petitioner contends, finally, that the mere fact the respondent claims to have fallen as a result of his foot coming in contact with the brace rod is not in and of itself sufficient to prove a defective safety appliance. In *Fryer v. St. Louis-San Francisco Railway Co.*, 63 S. W. (2d) 47, the Supreme Court of Missouri, said:

> "The mere fact that an injury has resulted from some condition of a locomotive or a part or appurtenance thereof does not itself show that the engine or its parts are not in proper condition and safe to operate," citing Watkins v. B. & M. R. R., 138 Atl. 315; Ford v. McAdoo, 131 N. E. 874, and Reeves v. Chicago, St. P. M. & O. Ry., 179 N. W. 689.

Conclusion.

It is respectfully submitted that this petition should be granted.

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